

(1991) 09 PAT CK 0033

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 4739 of 1990

Prema Nath Singh

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 23-09-1991

Acts Referred:

Citation : (1991) 09 PAT CK 0033

Judgement

S.N. Jha, J.—This writ petition was filed initially for quashing the general order passed by the Excise Commissioner as contained in his Memo No. 2370 dated 16th May, 1990 (Annexure 5) directing all Collector/ Deputy Commissioners not to renew the licences under the provisions of the Medicinal and Toilet Preparation (Excise Duties) Act, 1955 (in short "the Act") and the rules framed thereunder (in short "the Rules") in respect of Ayurvedic preparations which are capable of being used as ordinarily alcoholic beverages for the year, 1990-91. A prayer was also made for declaration that the petitioner having already made application for renewal of the licence and deposited necessary fee within the prescribed periods the licence should be deemed to have been renewed in his favour for the aforesaid period. During the pendency of the writ petition, an order has been passed on 9th August, 1991 rejecting the prayer for renewal of the licence on the grounds mentioned therein, and in the circumstance, a petition for amendment was filed on 11th September, 1991 for quashing the aforesaid order, a copy of which has been marked as Annexure-15.

2. Shorn of details, the case of the petitioner is that he made an application for grant of licence for manufacturing Ayurvedic preparation under the provisions of the said Rules. The Excise Commissioner approved the grant of licence in the name of Upma Chemical Industries, Sath (Vaishali) in respect of manufacture of Amar Sudha Rash, Mritsanjivini Sura, Mahadrakshasav, Pushpanjali (fine) and Ashwarisht specifying the respective quantities to be manufactured. The aforesaid approval was communicated by the Assistant Commissioner of Excise by Memo No. 1935 dated 17th April, 1989 and pursuant thereto, two licences in Form No. L-1 were issued by the licensing authority on 20th November, 1989 for

the manufacture of the aforesaid preparations for the period ending 31st March, 1990. According to the petitioner, he filed an application for renewal of licence for the period 1990-91 along with requisite fee on 17th March, 1990. No order, however, was communicated. The petitioner has asserted that it is the usual practice in the Department that the licensees after deposit of the fees and forms, continue to carry on business since no orders, one way or the other, are passed or communicated in time.

3. This writ petition was filed on 31st July, 1990 challenging the aforementioned order dated 10th May, 1990. By order dated 9th August, 1990, an interim order was passed by a Bench of this Court permitted the petitioner to carry on the manufacturing process giving, however, the respondents the opportunity to keep on inspecting the manufacturing process from time to time "in order to enable the petitioner to conform to the legal requirements of manufacture." In spite of the aforementioned interim order, no order one way or the other, was passed by the Excise Commissioner and thus, the petitioner continued to carry on his aforesaid business. According to him, on 4th February, 1991, he filed another application along with requisite fee for renewal of the licence for the period 1991-92.

4. After several adjournments granted to enable the Excise Commissioner to dispose of the renewal application, a counter-affidavit sworn by Shri Sone Lal Hembrum, Deputy Commissioner of Excise on 7th August, 1991 was filed on 28th August, 1991. The aforesaid counter-affidavit highlights the regulatory nature of the various provisions of the said Rules in order to justify the issuance of the aforementioned general order dated 16th May, 1990. No statement, however, was made in regard to the final result of the renewal application. As a matter of fact, as would appear from the order sheet dated 28th August, 1991, an officer of the Excise Department had informed the State Counsel on 13th August, 1991 that the renewal application would be finally disposed of within a fortnight. However, as has already been noticed above, the renewal application had already stood rejected on 9th August, 1991 which was brought to the notice of this Court by way of a supplementary counter-affidavit filed on 4th September, 1991. These facts, apparently, have no bearing on the issues arising for decision but nevertheless I have thought it appropriate to bring it to the notice of Excise Commissioner so that in future there should not be any communication gap between the Department and the State counsel and appropriate and full instructions are furnished to the State Counsel within time to avoid pendency of the cases for any unnecessarily long period.

5. It would appear from the aforesaid order dated 9th August 1991 (Annexure-15) that the renewal of the license has been refused on grounds that (1) the licensee did not set up the manufactory in accordance with the Rules or the map approved by the licensing authority (2) no provision has been made for the accommodation of the Bond Officer and staff, (3) get a pucca pits have been constructed in the premises which is not in accordance with the approved map

(4) no working space has been constructed and it has been lying vacant as open land within the premises and (5) the licensee has set distillation plant without the permission of the licensing authority and in violation of Rule 24 of the Rules. These grounds are said to be based on two inspection reports; one dated 15th September, 1990 by the Excise Superintendent, Vaishali and the other dated 20th September, 1990, being a joint report by the Excise Superintendent and a Deputy Collector deputed by the Collector, Vaishali. It may at this very stage be stated that in the counter-affidavit which was, as stated above, sworn only two days prior to passing of the aforesaid order, no such indication of existence of any such ground was given at all. Be that as it may, the petitioner has filed a xerox copy of the letter of the Collector, Vaishali addressed to the Excise Commissioner, Bihar dated 22nd September, 1990, as Annexure 10, on the subject of renewal of the petitioner's licence for the year, 1990-91, enclosing therewith the aforesaid reports dated 15th September, 1990 and 20th September, 1990. A perusal of the aforesaid letter dated 22nd September, 1990 not only shows that on the basis of the aforesaid report, the Collector was of the opinion that the management of the manufactory was generally in order and that the manufactory has been constructed as per the map approved by the Excise Commissioner, but it also discloses that the Collector had recommended the case of the petitioner for renewal of the licence. The petitioner has also filed true typed copy of the inspection report of the Deputy Commissioner of Excise, Tribut Division, Mazaffarpur in respect of the petitioner's manufacturing unit as Annexure-11. Para 8 of the aforesaid report shows that no irregularity had been reported for the year 1989-90 and 1990-91. Para 3 of the said report further shows that the manufactory is bounded on all sides by wall and accommodation has been provided to the Bond Officer on the eastern side of the manufactory. The petitioner in this connection has referred to certain other inspection reports submitted by the Excise Inspector dated 24-12-1990, 6-1-1991, 16-2-91, 12-3-91, 23-4-91 and 29-6-91 as detailed in paragraphs 10, 11 and 12 of the amendment petition.

6. Dr. Sadanand Jha appearing on behalf of the petitioner contended that the grounds stated in the impugned order dated 9th August, 1991 are not borne out by the aforementioned reports as also the letter of the Collector. He, accordingly, submitted that there has been complete non-application of mind on the part of the Excise Commissioner and the said order has been passed in hot haste in order to comply with this Court's earlier directions in this case to pass final order on the renewal application by 12th August, 1991 and in that process he failed to consider the aforesaid reports and other materials which are on the records. Dr. Jha further submitted that, in any view, the petitioner was entitled to an opportunity of hearing before passing an adverse order on the renewal application. Mr. D.N. Yadav, learned Government Pleader No. II, on the other hand, stated that the order is appealable under Rule 127 of the Rules before the State Government and further remedy by way of revision before the Central Government is also provided under Rule 128. He, accordingly, submitted that this

application should not be entertained on the ground that the petitioner has not availed of the alternative remedies.

7. Having heard learned counsel for the parties and considered all aspects of the matter, I am of the opinion that the submissions made on behalf of the petitioner, indicated hereinabove, have got substance. I do not want to go into the factual aspect of the matter, since that may be construed as expression of opinion on merits. The fact, however, remains that the reports, which are said to be basis of the order of rejection, *prima facie*, do not appear to be adverse to the petitioner. As stated above, the Collector in his letter dated 22nd September, 1990, while forwarding the same report, had recommended the case of the petitioner. In such a situation, it is difficult to sustain the order on the grounds stated therein. While dealing with the question of giving opportunity of hearing before passing an adverse order on the renewal application, the Supreme Court in the case of *Raj Restaurant and Another Vs. Municipal Corporation of Delhi*, stated the law in the following terms (at p. 1552 of AIR):

"Where, in order to carry on business a licence is required, obviously refusal to give licence or cancellation or revocation of licence would be visited with both civil and pecuniary consequences and as the business cannot be carried on without the licence it would also affect the livelihood of the person. In such a situation before either refusing to renew the licence or cancelling or revoking the same, the minimum principle of natural justice of notice and opportunity to represent one's case is a must. It is not disputed that no such opportunity was given before taking the decision not to renew the licence though it is admitted that for the reasons here in before set out the licence was not renewed. Such a decision in violation of the minimum principle of natural justice would be void."

The principle of law as stated above, applies with full force in the instant case, for the reason that, as indicated above, the reports which have been referred to in the impugned order as also other reports, copies of which have been brought on record by the petitioner, do not, *prima facie*, support the finding of the Excise Commissioner that there was any contravention of the provision under the Rules or the terms and conditions of the licence or that the petitioner had failed to carry out any direction of the Excise Commissioner or the licensing authority. The petitioner, admittedly, held a licence for the year, 1989-90 and if his conduct was not satisfactory or if he had violated any condition of licence or contravened any provisions of the Act or the Rules, certainly the Excise Commissioner could refuse to renew the licence on the basis of an adverse report(s) but in such a case the opportunity to explain any such adverse report ought to have been given. Without giving any such opportunity, the order of refusal to renew the licence cannot be said to be in compliance of the rules of natural justice and fair play. The application of this requirement will be more conspicuous in a case, like the present one where the report and recommendation are all in favour and therefore the applicant-licensee can reasonably expect that the licence, in the ordinary, course will be renewed. It is true that notwithstanding a favourable

report or recommendation, the competent authority, namely, Excise Commissioner may pass an adverse order as any such report or recommendation cannot be binding on him but, nonetheless, it cannot be said that this should be done without letting the person know of the grounds on which the authority proposes not to renew the licence. On these facts, I am constrained to hold that the impugned order dated 9th August, 1991 (Annexure-15) is not in accordance with law.

8. As regards objection raised by Mr. D.N. Yadav, it may only be said that such a plea regarding availability of alternative remedy has to be taken by the respondents in the first instance. This application was filed on 31st July, 1990 and thereafter, on successive dates, the case was heard. Plea of alternative remedy was not taken earlier. At the stage of final hearing, it is not open to them to take such a plea. The Supreme Court in the case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, took the view that once the High Court entertained the writ petition for consideration on merits, the same cannot be rejected at a subsequent stage merely on the ground that the statutory remedy was not availed of. The same view has consistently been taken by this Court. Reference in this connection may be made to a Bench decision in the case of *Loba Tanti @ Loba Tanti v. State of Bihar* 1976 BHCJ (HC) 1. It is also well settled law that availability of alternative remedy is not bar to exercise of power under Articles 226 & 227 of the Constitution of India.

9. Before I part with this order, I would like to observe that the practice which is said to be prevalent in the Excise Department in not passing any order on renewal application within time is something which cannot be approved (illegible) commencement of the year for which it is required, underlying idea being that within the aforesaid period of one month, the appropriate order on such application should be passed. If an application is filed for renewal within the time prescribed but no decision is taken in this regard, the resultant situation is that either the whole business activity should come to an end automatically on the expiry of the licence period i.e. 31st March of the year; and if it is carried on, it will amount to carrying on the business without a licence involving penal consequences. Either of the two cannot be justified. The manufacturing process in such establishments is an on-going process which involves large scale investment. The licensee, therefore, cannot be left in state of uncertainty not knowing as to whether on the expiry of the licence period, he has to stop the business or to continue to carry on the same in the hope that it will be renewed. That will lead to an unjust situation. If after lapse of considerable time, as in the instant case after about one and half years, a decision is taken refusing to renew the licence for the relevant period, the licensee can be said to have violated the provisions of the Act and Rules making him liable for the same, and that too with retrospective effect. I am conscious of the position that no person can claim a right to renewal of his licence and that every renewal is a fresh grant, but nonetheless any decision in accordance with law, one way or the other, has to be taken within the intervening period of the month. That in my opinion is the

proper construction of Rule 83. It is for the authority, namely, Excise Commissioner to devise ways and means and evolve an administrative machinery so that a mechanism is provided in which appropriate orders are passed on the basis of the reports within the said period. In this connection, it may also be pointed out that even in a case where the licence has been renewed and thereafter, the authority receives report in regard to any violation of law or terms and conditions of the licence etc., it is always open to pass appropriate orders in regard to revocation or suspension of the licence. But merely because the reports have not been received, a decision on renewal application should not be withheld. I would also like to point out that one month's period mentioned in Rule 83(1) is not mandatory and in appropriate cases delay in submission of the application can also be condoned. A perusal of the proviso to Sub-rule (2) of Rule 83 shows that such a power of condonation is implicit. Of course, it is for the authority to take appropriate decision in that regard.

10. I make it clear in this order that I am not interfering with the aforesaid order dated 16th May, 1990 (Annexure-5) since I am satisfied with the stand taken in paragraph 14 of the counter-affidavit wherein it has been stated that by the aforesaid general order the Excise Commissioner did not direct postponement of grant of licence or manufacturing process of such Ayurvedic Medicinal preparations, pending renewal of the licences, which are not capable of being used as ordinary alcoholic beverages. I approve of this stand since I am conscious of the fact that the licence for manufacture of Ayurvedic medicines can be misused for manufacturing such preparations which, in terms of Rule 67 of the Rules are capable of being used as ordinary alcoholic beverages. However, the present case is not a Case of that kind. I also make it clear that this order should not be misunderstood as expression of any opinion on the merits of the case which the, Excise Commissioner has ultimately to determine.

11. For the reasons stated above, the impugned order dated 9th August, 1991 (Annexure-15) is quashed. The matter is remitted back to the Excise Commissioner for passing a fresh order on the renewal application after giving an opportunity of hearing to the petitioner. The petitioner, in the meantime, will be permitted to carry on manufacturing process under the supervision of the Excise Officers and complying with all the requirements prescribed under the Act or the Rules and shall also comply with all lawful directions issued by them from time to time.

12. This application, accordingly, is allowed in the above terms but without any order as to costs.

Dharmpal Sinch, J.

13. I agree.